
**Rate Adjustment Due To Extraordinary
Or Exceptional Circumstances**

Docket No. R2010-4R

**REPLY COMMENTS OF THE SATURATION MAILERS COALITION
AND VALASSIS DIRECT MAIL, INC.**

(August 1, 2011)

Pursuant to Order No. 757, as clarified by Order No. 781 issued on Friday, the Saturation Mailers Coalition and Valassis Direct Mail, Inc. hereby submit their reply comments with respect to the proper interpretation of the “due to” standard of causation set forth in 39 U.S.C. section 3622(d)(1)(E).

Our initial comments anticipated the Postal Service’s arguments, none of which in any manner undermine the “due to” causation standard that we proposed: that the amounts sought by the Postal Service must be limited to that “due *solely* to” the exigent circumstance, based on a reasonable estimate of the actual financial harm caused solely by the exigent circumstance, excluding the effects of non-extraordinary factors.

In its initial comments, the Postal Service has presented an expansive and incorrect reading of both the statute and the Court’s holdings in *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011). The latter has been anticipated and thoroughly addressed in the initial comments of Time Warner Inc., pointing out the narrowness of the Court’s actual holding, dismantling the dicta that the Postal Service here cites as direction, and laying out the proper deferential legal standard for judicial review of an agency’s “*Chevron* step 2” interpretation of statutory ambiguities: “whether the agency’s answer is based on a permissible construction of

the statute.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This deference applies “even if the agency’s reading differs from that the court believes is the best statutory interpretation.”¹

In its core holding, the Court agreed with the Commission that “the plain meaning of ‘due to’ mandates a causal relationship between the amount of a requested adjustment and the exigent circumstances’ impact on the Postal Service.” 640 F.3d at 1267. The statute itself identifies only an “extraordinary or exceptional circumstance” as the basis for an exigent rate adjustment. It necessarily follows that the adjustment should be limited to the financial harm caused by that exigent circumstance, excluding the impact of other factors.

The Postal Service goes on at length about how the Commission must interpret the statute in a “balanced fashion,” claiming that the Commission’s original order overemphasized the role of the price cap in the regulatory scheme. However, even if the price cap and exigency provision are viewed as equals in the statutory scheme, that would not auger in favor of the Postal Service’s loose “general proportionality” causation standard to the extent that it would allow recovery for financial losses beyond those caused by the exigent circumstance. A balanced interpretation requires that both the price cap and the exigency provision be construed and applied strictly. It is the Postal Service that wants the statutory balance tipped.

The Postal Service’s other arguments are variations on the theme that exigent rate adjustment relief need not be confined to the harm caused by the exigent circumstance. For example, it cites dicta in the Court’s opinion that “[i]t would not be

¹ *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005), discussed in Time Warner’s initial comments at 10-13.

incorrect to say that the requested rate increase is ‘due to’ the extraordinary factor simply because it is also ‘due to’ other factors as well.” 640 F.3d at 1268. This dicta clearly confuses (1) the requirement for finding the existence of a triggering extraordinary circumstance with (2) the remedy – specifically, the level of the justifiable rate increase. The fact that other factors have adversely affected postal finances does not preclude relief for an extraordinary circumstance. That certainly does not mean, however, that the requested rate increase should compensate the Postal Service for the financial impact of those other non-extraordinary circumstances. The remedy properly should be confined to the economic harm actually caused by the extraordinary circumstance.

The Postal Service also distorts the Commission’s decision and the Court’s holding with respect to the so-called “strict offset” approach, claiming that:

“It would also be inconsistent with the Court’s decision, which indicated that the relevant question is whether the requested increase is ‘so *disproportionate* to the exigency’s impact on the Postal Service that it could not be considered ‘due to’ that exigency.’ *Id.* at 1268 n.6 (emphasis added). This language is consistent with a general proportionality standard, rather than a strict offset approach.” USPS Initial Comments at 7).

The citation from the Court’s decision is not only dicta, but was characterized by the Court *not* as a holding but instead merely as an issue that the Court had no need to address. The more correct interpretation of the statute, consistent with the balance between the rate cap scheme and the exigency provision, is that the “due to” causation provision relates strictly to the exigent circumstance, and therefore neither contemplates nor allows *any* recovery beyond that caused by the exigent circumstance.

In this context, the Postal Service's proposed "general proportionality" standard is overly vague and loose, opening the door to broad stabs at an impact estimate that could go well beyond the actual impact of the exigent circumstance. This concern is heightened by the Postal Service's contention that the "reasonable and equitable and necessary" clause of the exigency provision sets a benchmark for the allowable level of an exigency rate increase. The Postal Service, however, lost that argument when the court held that "the plain meaning of 'due to' mandates a causal relationship between the *amount* of a requested adjustment and the *exigent circumstances' impact* on the Postal Service." 640 F.3d at 1267 (emphasis added). The only benchmark is the financial impact of the exigent circumstance by itself.

We agree that a precise, rigid matching may in some cases be impractical. We do not read the Commission's Order No. 547 as requiring extreme precision. However, there still must be a reasonable estimate of the actual financial harm to the Postal Service caused by the exigent circumstance alone.

Respectfully submitted,

Thomas W. McLaughlin
Burzio McLaughlin & Keegan
1054 31st Street, N.W., Suite 540
Washington, DC 20007
(202) 965-4555
bmklaw@verizon.net

*Counsel for Valassis Direct Mail, Inc.
and the Saturation Mailers Coalition*